2006

State of Utah v. Darren Raymond Coco : Brief of Appellee

Utah Court of Appeals

Case No. 20061051-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Darren Raymond Coco,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for obstructing justice, a second degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable J. Dennis Frederick presiding

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

BRADLEY J. KNELL
CARA M. TANGARO
Salt Lake District Attorney's Office

Counsel for Appellee

MARGARET P. LINDSAY
PATRICK V. LINDSAY
99 East Center Street
Orem, UT 84058

Counsel for Appellant

Oral Argument Requested

Case No. 20061051-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Darren Raymond Coco,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for obstructing justice, a second degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable J. Dennis Frederick presiding

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

MARGARET P. LINDSAY
PATRICK V. LINDSAY
99 East Center Street
Orem, UT 84058

Counsel for Appellant

BRADLEY J. KNELL
CARA M. TANGARO
Salt Lake District Attorney's Office

Counsel for Appellee

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

Case No. 20061051-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Darren Raymond Coco,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for obstructing justice, a second degree felony, in violation of Utah Code Ann. § 76-8-306 (West 2004). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

STATEMENT OF THE ISSUE

Where the instructions and the general verdict form did not require the jury to determine whether defendant concealed evidence of a misdemeanor or felony, was the trial court required to treat defendant's conviction for obstructing justice as a class A misdemeanor rather than a third degree felony (enhanced one degree pursuant to the "in concert" enhancement)?[1]

---

[1] Defendant does not challenge the "in concert" enhancement on appeal.

Standard of Review. The "invited error" doctrine precludes an appellate challenge to jury instructions that defendant approved at trial below. *State v. Alfatlawi*, 2006 UT App 511, ¶ 26, 153 P.3d 804.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

§ 76-8-306. Obstruction of justice--Elements--Penalties--Exceptions

(1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense:

* * *

(c) alters, destroys, conceals, or removes any item or other thing;

* * *

(2)(a) As used in this section, "conduct that constitutes a criminal offense" means conduct that would be punishable as a crime and is separate from a violation of this section . . .

* * *

(3) The penalties for obstruction of justice are:

(a) a second degree felony if the conduct which constitutes an offense would be a capital felony or first degree felony;

(b) a third degree felony if:

(i) the conduct that constitutes an offense would be a second or third degree felony and the actor violates Subsection (1)(b), (c), (d), (e), or (f);

(ii) the conduct that constitutes an offense would be any offense other than a capital or first degree felony and the actor violates Subsection (1)(a); or

(iii) the obstruction of justice is presented or committed before a court of law; or

(c) a class A misdemeanor for any violation of this section that is not enumerated under Subsection (3)(a) or (b).

(4) It is not a defense that the actor was unaware of the level of penalty for the conduct constituting an offense.

* * *

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

Defendant was charged with (1) aggravated assault of Jerry Graham, and (2) obstruction of justice. R. 13-15. The charging information also gave notice that pursuant to Utah Code Ann. § 76-3-203.1 (West 2004), the obstruction of justice charge was subject to an enhanced penalty upon a finding that defendant acted in concert with two or more persons. R. 14. Following a two-day trial, a jury found defendant not guilty of aggravated assault but guilty of obstructing justice. R. 129-32, 176-77. The jury also returned a special verdict finding that defendant committed the offense of obstructing justice "in concert with two or more persons." R. 178. Prior to sentencing, defendant filed a motion to arrest judgment, asking that the court treat his conviction as a class A misdemeanor (subject, of course, to the "in concert" enhancement). R. 190-200. The court denied the motion, treated his conviction as a third degree felony, enhanced it to a second degree felony under the "in concert" enhancement, and sentenced defendant to an indeterminate prison term of one-to-fifteen years. R. 217-18; R. 251: 34-35, 38. Defendant timely appealed. R. 227-28.

B. Statement of Facts

The Confrontation and Beating

On the evening of November 18, 2005, defendant was at home in his fourth floor apartment with his friends, Keith DeGruy and Phyllis Scott. R. 252: 63-64, 149, 172; R. 253: 235, 250-51. Sometime between 7:30 and 8:00 p.m., they received a visit from Donald Joseph, Joseph's girlfriend Cocoa Marquez, and Joseph's backup Jerry Graham. R. 252: 53-54, 59, 61-63, 101, 172; R. 253: 211-12, 215, 231-32, 234, 251. Graham joined DeGruy and Scott in the dining room, picked up a pocket knife lying on the dining room table, opened it, and began playing with it. R. 252: 66, 68, 105-06; R. 253: 253-54. Meanwhile, Joseph and Marquez confronted defendant near his bedroom door and accused him of raping Marquez. R. 252: 63-65, 172; R. 253: 234, 241, 252. Defendant denied that he raped Marquez. R. 252: 65; R. 253: 241, 252; *but see* R. 252: 101-02. After Marquez insisted that he had, Joseph punched defendant in the face, causing his knees to buckle under him. R. 252: 65, 102-03, 105. Joseph then pulled out a metal wrench and began beating defendant over the head with it. R. 252: 172-73; R. 253: 234, 244, 246-47, 252-53.

Graham also joined in the beating of defendant. R. 252: 173; R. 253: 238-39, 241, 254-55.[2] When Graham saw DeGruy get up from the table to help defendant, he warned DeGruy to mind his own business. R. 252: 65, 68-69; R. 253: 254. As defendant attempted to defend himself from the two men, the fight spilled over into the kitchen. R. 252: 173, 234; R. 253: 258-60. As the fight continued, Cocoa Marquez and Phyllis Scott exited the apartment. R. 253: 234, 239, 244. Defendant was bloodied, appeared to have a broken nose, and was in "bad shape," but the beating continued. R. 252: 65-66, 70-73, 77, 88-89.

The Stabbings

At some point, defendant pulled out a knife from a kitchen drawer and fatally stabbed Joseph, who then fell behind a doorway. R. 252: 173-75; R. 253: 261, 266. He also stabbed Graham in the stomach. R. 252: 81-82, 111-12, 173-75; R. 253: 261-62. Graham, while holding his stomach to keep his intestines from spilling out, fled the apartment complex with Marquez, leaving Joseph behind. R. 252: 84-85, 113, 173; R. 253: 212, 234-35, 241-43, 262, 266-67. Marquez dialed 9-1-1 and the two walked down the street away from the complex until police and emergency personnel

---

[2] Graham denied that he joined in the beating of defendant. R. 252: 105. In fact, he claimed that he convinced Joseph to stop the beating and leave the apartment because he feared Joseph was "going to really hurt the guy" and "kill him." R. 252: 73-74, 78, 109-10. Graham's account was necessarily rejected by the jury because they acquitted defendant of aggravated assault.

arrived. R. 253: 211-12, 235. Before Graham was transported to the hospital, police recovered from one of his pants pockets the pocket knife he had taken from defendant's dining room table. R. 252: 186-87.

* * *

The parties' account of precisely how the stabbings unfolded varied. Defendant did not testify. However, when interviewed by police, he said that he stabbed Graham while Graham was fleeing the apartment. R. 252: 173. He claimed that as they were leaving the apartment, defendant got up from the floor, retrieved a knife from a kitchen drawer, and assaulted them with the knife. R. 252: 78-79. He testified that he was stabbed by defendant first. R. 252: 79-82, 111. He testified that defendant then rushed towards Joseph, who was attempting to flee towards the back of the home. R. 252: 84, 90, 113. In contrast, DeGruy testified that while defendant was being beaten by Graham and Joseph in the kitchen, defendant reached into the kitchen drawer, pulled out the knife, and stabbed his assailants in self-defense. *See* R. 253: 260-62, 266. Because the jury acquitted defendant of aggravated assault on Graham, this Court must assume that the jury accepted DeGruy's account that defendant stabbed Graham in self-defense. *See State v. Gordon*, 913 P.2d 350, 351 (Utah 1996) (holding that "[o]n appeal from a jury verdict, [the appellate court] view[s] the evidence and all reasonable inferences in a light most favorable to that verdict").

Obstructing Justice

After Graham and Marquez fled, defendant, DeGruy, and Scott decided to clean up the apartment rather than call police. R. 252: 179-80; R. 253: 270. Using rags, Comet, and PineSol, the three tried to wipe up the blood that had been spattered about from the beating and stabbings. R. 252: 176-77; *see also* R. 253: 263-64. Defendant washed the knife he used to stab Joseph and Graham. R. 252: 176. He washed the wall. R. 252: 176-77. He also tried to clean the large blood stain on the living room carpet and moved the couch over the stain. R. 252: 176. While they were cleaning up the apartment, the apartment manager knocked on defendant's door. R. 252: 175; R. 253: 206-07. Before opening the door to speak with the manager, defendant dragged Joseph's body into the living room behind a half wall that obstructed the body's view from the door. R. 252: 175-76; R. *accord* 253: 271.

After the manager left, the three finished cleaning up the apartment. *See* R. 253: 271. They filled two trash bags with rags and other soiled items. R. 252: 180; R. 253: 263-64. DeGruy took Joseph's pants and shoes and threw them into one of the trash bags. R. 253: 263-64, 268, 271. He then threw Joseph's body over the balcony to the ground below. R. 253: 263, 269. DeGruy deposited one of the trash bags into a dumpster at the apartment complex and the other into a dumpster outside a nearby JiffyLube. R. 252: 141, 160-61; R. 253: 264, 271. Knowing that police were

likely on their way, defendant, Graham, and Scott left in a taxi cab and stayed at a Motel 6. R. 253: 272.

The Police Investigation

Later that evening, when police discovered Joseph's body on the ground directly below defendant's apartment, found evidence that it had been dropped from above, and learned from neighbors that a fight had occurred earlier that evening at defendant's apartment, they secured a warrant to search defendant's apartment. R. 252: 125, 128-31, 139-40. Upon entering the apartment, homicide detective Kelly Kent immediately detected a the "very obvious" and strong "smell of cleaners; Comet, PineSol, bleach, that kind of thing." R. 252: 133, 147, 170. Officer Kent also saw on the door knobs and counters the "white, hazy film" that Comet leaves when it is not wiped clean with a fresh, wet rag. R. 252: 131-32, 147. In the pantry, he found a bottle of PineSol, a can of Comet, a box of black GLAD trash bags with "scalloped" tie tops, and a mop. R. 252: 133-34, 145; SE21. The mop was still wet and smelled of PineSol. R. 252: 134.

Officer Kent also saw blood spatter throughout the apartment—on the counter, walls, doors, and carpet. R. 252: 133, 138-39, 146-48, 159-60; *accord* 170-71. He also found evidence that the couch in the living room had recently been moved, and after officers moved it aside, he saw a large blood stain on the carpet. R. 252: 135-37, 171. He found a large kitchen knife in the dishwasher that appeared to have

some remaining blood where the blade meets the handle. R. 252: 144-45; SE18-20. Officers also found blood, which appeared to have been partially wiped clean, on the balcony of the apartment. R. 252: 138. They also found blood drops on the third floor balcony directly below defendant's apartment. R. 252: 139.

Police recovered rags smelling of PineSol in a black trash bag, identical to GLAD bags found in the pantry, in a dumpster in the utility room of the apartment complex. R. 252: 134-38, 140, 145; SE5-6. Several days later, police found a black trash bag, again identical to the GLAD bags in defendant's pantry, in a dumpster outside of a JiffyLube that was a block and a half west of the apartment complex. R. 252: 141-42, 145, 160-61. Upon opening the bag, it smelled of PineSol and contained bloody rags, blankets, shoes, and a pair of pants. R. 252: 142-43; SE15-17.

After five days of searching for defendant, police finally tracked him down to a friend's apartment. R. 252: 148-51, 154, 161-62. Defendant had multiple injuries to his head, face, hands, arms, and torso. R. 252: 151, 185-86; DE25, 30-31, 38-40. When asked about the injuries, defendant told officers that a couple of days ago some people had visited him at his apartment, accused him of rape, and attacked him—one of them with a wrench. R. 252: 151-52. Officers never found the wrench. R. 252: 181. Although DeGruy claimed that defendant did not help in the clean-up, he denied disposing of the wrench himself. R. 253: 265, 270. When defendant was asked about the wrench following his apprehension, he told police to talk to

DeGruy. R. 252: 181. His injuries, however, were consistent with his claim that he was beaten with a wrench. *See* R. 252: 155-56.

SUMMARY OF ARGUMENT

Under section 76-8-306, a conviction for obstructing justice is (1) a second degree felony if the defendant obstructs the investigation of a capital felony or a first degree felony, (2) a third degree felony if the defendant obstructs the investigation of a second or third degree felony, and (3) a class A misdemeanor if the defendant obstructs the investigation of a misdemeanor. Defendant argues that because the jury was not instructed on these differences and the court cannot determine from the general verdict on what basis the jury found obstruction, his conviction should be entered as a class A misdemeanor, enhanced to a third degree felony under the "in concert" enhancement. (Defendant does not challenge the "in concert" enhancement). Defendant, however, approved the jury instructions. Accordingly, his claim may not be heard on appeal under the invited error doctrine.

Defendant's claim would fail in any event. A review of the record demonstrates that the jury only considered underlying criminal conduct that constituted a felony. Accordingly, the trial court properly entered defendant's conviction for obstruction of justice as a third degree felony, enhanced to a second degree felony under the "in concert" enhancement.

ARGUMENT

THE TRIAL COURT PROPERLY ENTERED DEFENDANT'S CONVICTION FOR OBSTRUCTION OF JUSTICE AS A THIRD DEGREE FELONY, ENHANCED TO A SECOND DEGREE FELONY UNDER THE "IN CONCERT" ENHANCEMENT

Under section 76-8-306, a person is guilty of obstructing justice if he or she "alters, destroys, conceals, or removes any item or other thing" with the "intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense." Utah Code Ann. § 76-8-306(1)(c) (West 2004). A conviction under subsection (1)(c) may be entered as a second degree felony, a third degree felony, or a class A misdemeanor, depending on the nature of the crime sought to be concealed. A person is guilty of:

> (a) a second degree felony if the conduct which constitute[d] an offense would be a capital felony or first degree felony;
>
> (b) a third degree felony if . . . the conduct that constitute[d] an offense would be a second or third degree felony . . . ; or
>
> (c) a class A misdemeanor for any [other] violation . . . .

Utah Code Ann. § 76-8-306(3) (West 2004).

Following the jury verdict finding defendant guilty of obstructing justice, defendant filed a motion to arrest judgment, requesting that the district court treat his conviction as a class A misdemeanor under subsection 3(c), rather than as a third degree felony under subsection 3(b). R. 190-200. Defendant did not challenge the

jury's finding that he acted in concert with two or more persons. Accordingly, he requested that his conviction be entered as a third degree felony, rather than a second felony, under the "in concert" enhancement. R. 190-200. The State opposed defendant's motion, arguing that defendant's conviction should be treated as a third degree felony (enhanced to a second degree felony under the "in concert" enhancement). The district court denied defendant's motion and entered defendant's conviction as a second degree felony.

A. This Court should not address defendant's claim because he invited any error.

On appeal, defendant complains that "[i]t is impossible to determine from the jury's verdict what criminal conduct they found" he attempted to conceal. Aplt. Brf. at 20. Similarly, he complains that "the jury was not instructed on what underlying criminal conduct would make the offense a third degree felony [under subsection 3(b)], and or a class A misdemeanor [under subsection 3(c)]. Aplt. Brf. at 21. Defendant thus argues that "he is entitled to the lesser degree punishment" because it cannot be determined, "by the manner in which the jury was instructed, or by the jury verdict," whether the jury relied on misdemeanor or felony conduct. Aplt. Brf. at 22.

Defendant has not argued that the evidence was insufficient to support a jury finding that he attempted to conceal evidence of a felony or a misdemeanor. *See* Aplt. Brf. at 18-22. He simply claims that because the jury was not sufficiently

instructed on the variations of the obstruction charge and was given only a general verdict form, he is entitled to be sentenced to the lesser degree of punishment. His claim fails because he invited any error.

A review of the record reveals that except for perhaps one exception, the parties stipulated to the instructions given to the jury. Before trial began, defense counsel indicated that "[t]here maybe [sic] some outstanding matters in terms of jury instructions," but that "maybe [they] could work them out." R. 252: 1. The trial court replied, "Sure. If you're able to submit to me a stipulated set, that's great." R. 252: 1.

The instructions were not mentioned thereafter until after the close of the State's case-in-chief and the trial court's denial of defendant's motion for a directed verdict. Although defense counsel did not have the proposed instructions before him, the court invited him to state his exception to proposed Instruction No. 29, which apparently explained the meaning of "conduct that constitutes a criminal offense" and identified homicide as one such criminal offense. R. 253: 248. Counsel for defendant stated that he objected to the instruction's inclusion of homicide as one of the underlying offenses, complaining that it would make the obstruction of justice charge "a higher level of offense," R. 253: 248, i.e., it would be a second degree felony under subsection 3(a). He also complained that the instruction was "confusing to the jury." R. 253: 248. The prosecutor countered, explaining that the

instruction was an accurate statement of the law and that inclusion of homicide was necessary for the jury to understand that "there is an underlying reason for the obstruction." R. 253: 249. The trial court then noted that it had in fact "ma[d]e certain modifications to that instruction request, at [defense counsel's] request." The court further explained that "the concept needed to be defined and furthermore, that the definition cited in Instruction No. 29 is in compliance with the statutory provision." R. 253: 249.

The instructions were not again mentioned in the record until just prior to their reading. In introducing the instructions, the trial court stated that it would "now give [the jury] the instructions on the law, which counsel and I have been working on in our incessant delays." R. 253: 274-75. It is apparent from the court's comment, and the lack of any other objection, that the parties worked out any differences they had on the instructions and stipulated to the instructions as given. The only complaint registered by defendant to the instructions was to the identification of homicide as an underlying offense for obstruction, and he made no objection to it afterwards. Nor has defendant challenged it on appeal.

Defendant did not ask that instructions be given advising the jury that they should determine whether defendant concealed evidence of a misdemeanor offense or a felony offense. Defendant did not request a special verdict form, but apparently agreed to the issuance of the general jury verdict form. "Because trial

counsel confirmed the jury instructions without objection, invited error prevents [this Court's] review" on appeal. *State v. Alfatlawi*, 2006 UT App 511, ¶ 26, 153 P.3d 804. "Defendant cannot lead the court into error by failing to object and then later, when he is displeased with the verdict, profit by his actions." *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996) (quotations and citations omitted).[3]

B. A review of the record reveals that the jury's verdict of guilt could not, in any event, have been based on a finding that defendant concealed evidence of a misdemeanor offense.

In any event, a review of the record demonstrates that the jury could not have concluded that defendant obstructed the investigation of a misdemeanor offense. Defendant argues that the jury could have found he obstructed the investigation of a number of crimes, including misdemeanor offenses. Aplt. Brf. at 19. He argues that because the court cannot determine whether the jury relied on a misdemeanor or felony offense, principles of equal protection and due process require a finding that the jury relied on the lesser misdemeanor offense. Aplt. Brf. at 22. As such, defendant reasons, the obstruction of justice conviction would be a class A misdemeanor under section 76-8-306(3)(c) (enhanced to a third degree felony pursuant to the "in concert" enhancement). Aplt. Brf. at 22.

---

[3] Even assuming, arguendo, that defendant did not affirmatively approve the jury instructions and general verdict form, but simply failed to raise an objection, review of his claim under plain error is precluded because he has not argued plain error.

Defendant's claim fails on the merits because it rests on a faulty premise—that the jury might have found that he obstructed the investigation of a misdemeanor, rather than a felony. *See* Aplt. Brf. at 20-21. A review of the instructions and the prosecutor's closing arguments reveals that the jury could not have based its verdict on conduct that constituted a misdemeanor offense because no such offense was identified in the instructions or otherwise argued by the prosecutor.

The instructions to the jury specified only a limited number of offenses upon which the jury could rely in deciding whether defendant obstructed justice. Instruction No. 29 identified four offenses upon which the jury could rely in convicting defendant of obstruction of justice:

> "Conduct that constitutes a criminal offense" means any conduct that would be punishable as a crime, including the following crimes:
>
> 1. Aggravated Assault
> 2. Burglary
> 3. Homicide
> 4. Abuse or Desecration of a Dead Human Body.

R. 164.[4] Each of the listed offenses is a felony. *See* Utah Code Ann. § 76-5-103 (West 2004) (making aggravated assault either a second or third degree felony); Utah Code Ann. § 76-6-202 (West 2004) (making aggravated assault a third degree felony or, a

---

[4] As noted above, *supra*, at 13, defendant objected to at least some previous version of this instruction. His trial objection, however, went to the inclusion of homicide as an underlying offense. *See* R. 253: 248. He has not renewed that challenge on appeal.

second degree felony if committed in a dwelling); Utah Code Ann. § 76-5-203 (West 2004) (making criminal homicide murder a first degree felony); Utah Code Ann. § 76-9-704 (West 2004) (making it a third degree felony for a person to "disturb[ ], move[ ], remove[ ], conceal[ ], or destroy[ ] a dead human body").

Defendant argues that the jury may have found that he obstructed the investigation of a class B misdemeanor simple assault committed by Joseph or Graham. Aplt. Brf. at 20. This argument fails because the jury was not instructed on simple assault. Instruction No. 29 identified only aggravated assault, R. 164, and the jury was made aware of the elements of aggravated assault in Instruction Nos. 17 and 18, R. 152-53. Moreover, the record clearly supports a finding of aggravated assault. Joseph severely beat defendant with a wrench and Graham either joined in the beating or aided and abetted Joseph by preventing DeGruy from coming to defendant's defense. *See* . 252: 65, 68-69, 173; R. 253: 238-39, 241, 254-55. Moreover, defense counsel at closing argued that the assault on defendant constituted a felony assault. *See* R. 253: 313. He cannot now claim on appeal that it was no more than a simple assault.

Defendant argues that the jury may have found that he obstructed the investigation of a homicide "rang[ing] from a capital felony to a class A misdemeanor (negligent homicide)." Aplt. Brf. at 20. Again, defendant's argument fails because the jury was not instructed on any of the misdemeanor alternatives.

Although Instruction No. 29 identified homicide generally, R. 164, Instruction No. 23 set forth the elements of intentional or knowing homicide, R. 158. No other option was offered to the jury for consideration.[5]

Defendant argues that burglary could not form the basis of defendant's conviction because the evidence did not support such a finding where defendant was invited into the apartment. Aplt. Brf. at 20. Defendant, however, did not challenge inclusion of this offense in the jury instruction. Moreover, in closing, defense counsel himself suggested that Joseph's entry into the home constituted a burglary, but argued that the jury should not find obstruction of justice based on criminal conduct perpetrated against defendant as a victim. *See* R. 253: 310. Defendant cannot now claim that the jury could not rely on it because the evidence was insufficient. *See Anderson*, 929 P.2d at 1109 (discussing invited error doctrine).[6]

Defendant notes that abuse or desecration of a dead human body can either be a class A misdemeanor or a third degree felony. Aplt. Brf. at 20. This is true. *See* Utah Code Ann. § 76-9-704(4) (West 2004). However, the jury was not instructed on the elements of this offense, but given only its common name. As such, nothing in

---

[5] In addition, Instruction Nos. 20, 21, and 22 explained the elements of burglary. R. 155-57.

[6] Defendant has not claimed on appeal that a person cannot obstruct the investigation of a crime perpetrated against him as a victim, and for good reason. Nothing in the statute indicates that a victim of crime cannot commit obstruction of justice. *See* Utah Code Ann. § 76-8-306 (West 2004).

the record suggests that the jury might have based its obstruction conviction on the misdemeanor offense of abuse or desecration of a human body, which occurs only if a person fails to report the finding of a dead human body. Utah Code Ann. § 76-9-704(a). Nothing in the common name even hints that a failure to report would constitute a violation of the offense. By contrast, the common name for the offense does suggest that moving a body and throwing it over a balcony would constitute a violation of the offense. *See* Utah Code Ann. § 76-9-704(2)(b) & (4)(b) (making it a third degree felony to intentionally and unlawfully "disturb[ ], move[ ], remove[ ], conceal[ ], or destroy[ ] a dead human body"). The evidence clearly supported such a finding.

In any event, the prosecution only asked the jury to find that defendant obstructed the investigation of Joseph's homicide and the aggravated assaults on Graham and on defendant himself. In closing and rebuttal arguments, the prosecution did not ask the jury to find that defendant obstructed the investigation of the offense of abuse or desecration of a human body. *See* R. 253: 298-306, 316-19. Nor did it ask the jury to find that defendant obstructed the investigation of a burglary. *See* R. 253: 298-306, 316-19. The prosecution limited its argument to aggravated assault and homicide. After noting that "[t]here were lots of crimes that were committed in th[e] apartment," the prosecutor in closing identified them:

> . . . There is a crime that [Joseph] committed against [defendant], aggravated assault for hitting him with that socket wrench. . . . .
>
> There was a crime of [defendant] stabbing Jerry Graham and even though a homicide is not charged in this case, there was a homicide in this case and you're allowed to consider that when you're looking at obstruction of justice.

R. 253: 302. During rebuttal, the prosecutor again argued that the homicide of Joseph constituted predicate conduct from which the jury could find obstruction of justice. *See* R. 253: 317-19. Indeed, the homicide was the emphasis of the prosecution's obstruction case.

In sum, the jury was asked to consider only a few offenses in its determination of whether defendant obstructed justice: homicide (a first degree felony), aggravated assault of Graham (a second degree felony), and aggravated assault of defendant (a second degree felony). While it is true that it is impossible to determine from the jury verdict which of these offenses the jury relied in finding that defendant obstructed justice, a misdemeanor offense was not among the jury's options. Because defendant's obstruction conviction may have been based on either a first degree felony (intentional or knowing homicide) or a second degree felony (aggravated assault), the trial court properly treated the conviction as a third degree

felony (the lesser of the possibilities), and enhanced it to a second degree felony under the "in concert" enhancement.[7]

Defendant cites *State v. Bingham*, 575 P.2d 197 (Utah 1978), in support of his claim on appeal. Aplt. Brf. at 20-21. That case, however, does not support defendant's claim.

In that case, Bingham and two friends approached Sonny Cordova, presumably to confront him about a fight he had earlier with one of Bingham's friends. *Id.* at 198. However, when Bingham saw that one of his friends was holding a gun, "he wanted no part of it and went back to his car." *Id.* While returning to his car, Bingham heard two shots which resulted in the death of Cordova (and a shoulder injury to Cordova's companion). *Id.* When Bingham's friends returned to the car, Bingham bent his rear license plate so it could not be read and then drove away with them. *Id.* Bingham was convicted of second degree felony obstruction of justice for aiding the escape of someone who had committed

---

[7] The State agrees that where it cannot be determined which of these offenses the jury relied in finding defendant guilty of obstruction of justice, the court must assume that it relied on the lesser of the possible offenses and sentence him accordingly. *See United States v. Cooper*, 966 F.2d 936, 940 (5th Cir.) (recognizing that "a sentencing judge faced with a conviction on a count that charged the violation of more than one statute, but where the jury failed to specify the violation found, is limited to imposing a sentence that does not exceed the maximum penalty under the statute providing the least severe punishment), *cert. denied*, 506 U.S 980 (1992).

an intentional homicide. *Id.* On appeal, Bingham argued that he could only be convicted of misdemeanor obstruction. *Id.*[8]

Bingham argued that "before he could be convicted of [felony obstruction] it must first appear that the offender whose escape he aids has been convicted of either a capital offense or a first degree felony." *Id.* He reasoned that because neither of his friends had been tried or convicted of homicide, his conviction should have been entered as a misdemeanor. *Id.* The Supreme Court rejected Bingham's argument, concluding that requiring a conviction for the underlying offense would "be[ ] unsound and impractical because it could defeat, rather than carry out, the purpose of the [obstruction] statute." *Id.* The Court observed that "[t]here are a number of circumstances where the principal offender might not be convicted and the one who aided his escape could thus never be brought to justice." *Id.* For example, "the offender might be killed" during his escape, "or he might make good his escape and never be apprehended, or for some other reason never prosecuted, or never convicted." *Id.*

The Court concluded that the obstruction statute should instead be applied "in a reasonable and practical manner as to the guilt or innocence of the particular

---

[8] Under the statute in effect at the time, obstruction of justice was a class B misdemeanor unless the underlying crime was a capital felony or first degree felony, in which case it was a second degree felony. *See Bingham*, 575 P.2d at 198.

accused as shown by the circumstances." *Id.* at 199. The Court held that "all the state should be required to prove is that he either knew, or should have known, that such a capital offense or felony in the first degree had been committed, and then violated the provisions of Section 76-8-306(1) by providing the offender with transportation for the purpose of avoiding his discovery or apprehension." *Id.*

Bingham nevertheless argued that he could not in any event be convicted of felony obstruction because he did not know that either of his friends had committed homicide. *Id.* at 198. The Court agreed. *Id.* at 199. The Court observed that although Bingham aided his friends flight after hearing the shots (and bent his license plate so that it could not be read), no evidence established that he knew Cordova had actually been shot—no evidence was introduced indicating that he went near the cab of the truck after the shooting, that he saw his friend shoot Cordova, or that his friends told him what had happened. *Id.* The Court concluded that given this lack of evidence, "the facts shown [were] reasonably reconcilable with other possibilities" and thus "not sufficient upon which [the jury] could fairly and justly . . . conclude[ ] beyond a reasonable doubt that the defendant knew or should have known that a homicide had been committed." *Id.*

To the extent defendant here suggests that the jury could not rely on the homicide in support of its obstruction finding because he "was not charged with homicide against Joseph," *see* Aplt. Brf. at 20, *Bingham* rejects that claim. As noted,

such a policy would be "unsound and impractical because it could defeat, rather than carry out, the purpose of the [obstruction] statute." *Bingham*, 575 P.2d at 198. *Id.* Indeed, such a policy would reward someone who is not prosecuted or convicted because he or she was particularly successful at concealing the evidence.

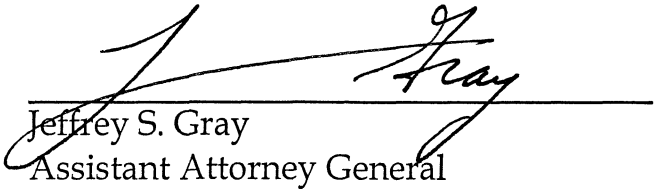
As explained in *Bingham*, the State must simply demonstrate that defendant "either knew, or should have known" that the offense had been committed. *Id.* Unlike the case in *Bingham*, defendant here cannot plausibly claim that he did not know that a homicide occurred. Moreover, Bingham's obstruction charge was based on obstructing the criminal investigation or apprehension of someone else. Defendant's obstruction charge was based on obstructing the criminal investigation of his own conduct. Whereas Bingham could plausibly claim that he did not know that the victim was mortally wounded, defendant cannot make such a claim. And even though some evidence may have supported a jury finding of self defense, *see* R. 253: 260-62, 266 (other evidence did not, *see* R. 252: 84, 90, 113), such a claimed justification does not negate the intentional or knowing nature of Joseph's killing and the statute's prohibition against tampering with the evidence.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm the trial court's entry of judgment of obstruction of justice as a third degree felony, enhanced to a second degree felony under the "in concert" enhancement.

Respectfully submitted June 22, 2007.

Mark L. Shurtleff
Utah Attorney General

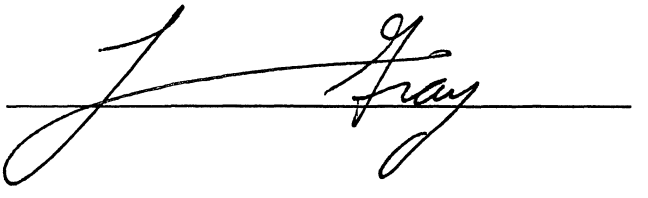


Jeffrey S. Gray
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2007, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Darren Raymond Coco, by causing them to be delivered by first class mail to his counsel of record as follows:

Margaret P. Lindsay
Patrick V. Lindsay
99 East Center Street
Orem, UT 84058



6/22/2007 11:00 PM

ADDENDUM A

INSTRUCTION NO. 17

A person commits Aggravated Assault if that person commits assault and (a) intentionally causes serious bodily injury to another; or (b) uses a dangerous weapon or other means or force likely to produce death or serious bodily injury.

INSTRUCTION NO. 18

"Assault" is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another; or

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another.

"Bodily injury" means physical pain, illness or an impairment of physical condition.

"Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

"Unlawful or unlawfully" means that which is contrary to law or unauthorized by law, or, without legal justification, or, illegal.

INSTRUCTION NO. 20

Under the law of the State of Utah, a person is guilty of Burglary if he enters or remains unlawfully in a dwelling or any portion of a dwelling with the intent to commit a theft or commit an assault on any person.

INSTRUCTION NO. 21

When a person unlawfully enters a dwelling with the intent to commit a theft or an assault on any person, the crime of Burglary is committed and the successful completion of the intended theft or assault need not be shown.

INSTRUCTION NO. 22

A person "enters or remains unlawfully" in or upon the premises when the premises or any portion thereof at the time of the entry or remaining are not open to the public and when the actor is not otherwise licensed or privileged to enter or remain on the premises or such portion thereof.

"Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

"Enter" means intrusion of any part of the body or intrusion of any physical object under the control of the actor.

Instruction 23

A person commits criminal homicide if that person intentionally and knowingly causes the death of another human being. Criminal homicide may be justified and not punishable as a crime if self-defense is applicable

Instruction 24

Conduct that constitutes a criminal offense means conduct that would be punishable as a crime and is separate from a violation of the offense of Obstruction of Justice.

INSTRUCTION NO. 25

A separate crime or offense is charged in each count of the Informations. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

INSTRUCTION NO. 26

The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 27

Before you can convict the defendant, Darren Raymond Coco, of the crime of Aggravated Assault, as charged in count I of the Information, which is alleged to have occurred on or about November 18, 2005 in Salt Lake County, Utah, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That the defendant, Darren Raymond Coco, assaulted Jerry Graham; and

2. That the said defendant intentionally or knowingly assaulted Jerry Graham; and

3. That the said defendant then and there intentionally caused serious bodily injury to Jerry Graham.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Assault as charged in count I of the Information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count I.

INSTRUCTION NO. 23

Before you can convict the defendant, Darren Raymond Coco, of the crime of Obstructing Justice, as charged in Count II of the Information, which is alleged to have occurred on or about November 18, 2005, in Salt Lake County, State of Utah, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1. That the defendant, Darren Raymond Coco, as a party to the offense, altered, destroyed, concealed, or removed any item or thing;
2. With the intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person;
3. Regarding conduct that constitutes a criminal offense.

If, after careful consideration of all the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Obstructing Justice as charged in count II of the Information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II.

INSTRUCTION NO. 29

"Conduct that constitutes a criminal offense" means any conduct that would be punishable as a crime, including the following crimes:

1 Aggravated Assault

2 Burglary

3 Homicide

4 Abuse or Desecration of a Dead Human Body.